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No. 86-1702

IN THE

Supreme Court of the United States

October Term, 1986

UNITED DAIRYMEN OF ARIZONA,
Petitioner,

vs.

JEROME LaSALVIA and PEGGY LaSALVIA,
Respondents.

REPLY OF PETITIONER TO BRIEF OF RESPONDENTS IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION

Introduction

1. Respondents' Brief In Opposition (Br.) attempts to rewrite the decision below in an effort to make it compatible with established legal principles from which it departs. The decision does not "reaffirm the general principle that a final refusal begins the running of the statute of limitations and that subsequent reaffirmations of the earlier refusal do not extend the limitations period" (Br. 5). The decision holds that an illegal refusal to deal will not begin the running of the statute of limitations unless the initial refusal is "irrevocable, immutable, permanent and final." Br. 7, Pet. A7. Nor does the court of appeals hold that respondents may challenge petitioner's "restrictive" practices "because these 'were employed in an unlawful quest for market dominance' which caused harm to respondents". Br. 4. What the decision says is "[r]ather than giving rise to liability independently, the allegedly unlawful practices serve an evidentiary function." Pet. A5.

Nothing in the decision below supports respondents' assertion that "[f]rom 1975 to 1981 . . . UDA refused to accept respondents' milk for processing" (Br. 2)[1]; nor does the decision state that "UDA's 'exploitation of its market position' . . . involved . . . actions by petitioners during the four years prior to filing of the complaint. . . ." Br. 5. The decision holds, instead, that "despite the finality of the refusal" and absence

[1] "After [May 23, 1975] Plaintiff never again directly contacted UDA about purchasing his milk until after this action was filed in 1980." Pet. A21.

of overt acts during the limitation period "[i]f . . . damage accrued during [the limitation period] then the action is not barred . . . ." Pet. A10.

2. Respondents' brief ignores the district court's factual determinations, undisturbed by the appellate court, that the discovery record is devoid of allegations or evidence of overt acts by petitioner during the limitations period (Pet. A24) and that the refusal by other processors during the limitations period to buy respondents' milk "were reaffirmations of the original [1975] refusal(s) to deal." *Id.* at A23. The district court's finding as an "ultimate fact" (*Pullman-Standard v. Swint*, 456 U.S. 273, 286, 293 (1982)) that "Plaintiffs' cause of action accrued no later than 1975" (Pet. A24) was based on undisputed "historical facts" (*Pullman-Standard* at 289, n.19) admitted by respondents which demonstrated that "Plaintiffs themselves knew of and believed they had a cause of action in 1975" (Pet. A24) coupled with the fact that "Plaintiffs . . . allege no overt acts on the part of UDA during the limitations period" (*ibid.*) and "never contacted UDA between 1975 and the time the action was filed." Pet. A22.

Respondents argue that the appellate court nonetheless was correct in holding that the "finality of UDA's 1975 refusal to deal with the LaSalvias" (Pet. A8) is a jury question because UDA purchased some milk from respondents in 1981, a year after they brought suit, and testimony by UDA's manager, Girard, concerning his 1975 refusal "can be read to give . . . hope that UDA would relent." *Ibid.* But Girard's subjective mental state, whether expressed or not, obviously cannot create a genuine fact issue as to respondents' expressed belief in 1975 that they had a cause of action against UDA.

The issue is not whether UDA considered its refusal to deal with respondents in 1975 as irrevocable and final. The issue is whether respondents asserted and believed that UDA's refusal in 1974 and 1975 to deal with them was emphatic and unlawful. On that question there is simply no genuine issue.

3. Respondents contend that review of the appellate court's decision is unwarranted because: (1) "it is inherently fact bound" (Br. 6); (2) deference to the district court's determination urged by petitioner is a "novel proposition" devoid of supporting authority (*ibid.*); (3) there is no conflict between the decision below and the cases relied on by petitioner (Br. 7) and (4) the court of appeals "continuing violation" holding based on *Hanover Shoe, Inc. v. United Shoe Machinery*, 392 U.S. 418 (1968), is correct. Br. 8-9.

ARGUMENT

1. Where An Appeal Is From A Summary Judgment Which Decides An Issue Of Ultimate Fact Based Upon The Non-Moving Party's Allegations, Admissions And Documentary Evidence, The Standard Governing Appellate Review Under Rule 52(a) Should Apply.

The Ninth Circuit's uniform rule that findings by a trial judge in a summary judgment proceeding are not entitled to deference upon review (Pet. 11) stems from the unwarranted notion that only questions of law are decided on summary judgment. See Schwartzer, J., *Summary Judgment Under The Federal Rules: Defining Genuine Issues Of Material Fact*, 99 F.R.D. 465, 489 (1984). The decision below holds that the "finality" of UDA's 1975 refusal to deal with the respondents is a "material factual question" on which the evidence is "ambiguous" (Pet. A8-9), notwithstanding the district court's contrary finding based on respondent counsel's contemporaneous notes, respondents' deposition testimony and contemporaneous documents (Pet. 6, A20-21) that in 1975 "Plaintiffs believed that UDA's and the other handlers' refusals to deal with them were final." Pet. A24.

In characterizing the "finality of UDA's refusal to deal"[2] as a disputed material fact issue, the court of appeals did not decide a question of law; it simply concluded that it was free to reexamine the undisputed factual record which formed the basis of the district court's finding, reject it as "ambiguous" (Pet. A8) and require its submission to a jury for resolution. *Ibid.*

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[2] Whether "finality" of an antitrust defendant's refusal to deal is relevant to the question of when a cause of action under §4 of the Clayton Act arises is discussed *infra*.

That conclusion is at odds with the rationale of this Court's holding in *Pullman-Standard, supra*, that a trial court's finding, "whether an ultimate fact or not", (456 U.S. at 293) based on admitted or established "historical facts" and involving no assessment of witness demeanor or credibility is reviewable under the clearly erroneous standard of Rule 52(a). "This is so even when the district court's findings . . . are based on physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). *Pullman-Standard* "rejects implicitly the rationale underlying de novo review of summary judgment, i.e. that the court of appeals is equally well situated to decide the issue because it has before it the same record as the trial court. . . ." Schwartzer, J., *supra*, 99 F.R.D. at 490-91. See *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *Worthen Bank & Trust Co. v. Franklin Life Ins. Co.*, 370 F.2d 97, 99 (8th Cir. 1966).

Respondents' belief "that UDA's and the other handlers' refusal to deal with them were final" (Pet. A24) removes the "finality" issue from the case. Once a fact is admitted or alleged by the party opposing a motion for summary judgment, no genuine issue as to that fact remains for resolution by a jury. *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947).

2. The Ninth Circuit's "Finality" Requirement Is In Conflict With Decisions Of Other Circuits.

Respondents contend that the court of appeals was correct in holding that the finality of UDA's 1975 refusal to deal was a disputed material fact issue because there is evidence that the 1975 refusal was not "immutable, final or irrevocable." Br. 7. But "immutable, irrevocable finality" is a metaphysical,

not a legal, concept that only the Ninth Circuit demands that a defendant establish as a basis for determining when a cause of action arises and the statute begins to run in a refusal to deal case. The Ninth Circuit's and respondents' reliance on the claimed reiterated request by respondents' counsel in 1977-78 (Br. 3, 7) belies their assertion that "[t]here is no conflict between the decision below and *Garelick v. Goerlich's, Inc.*, 323 F.2d 854 (6th Cir. 1963)." Br. 7.

There is nothing in *Garelick* or in the other cases cited by petitioner (Pet. 13-14) that conditions the commencement of the running of the statute on a showing by defendant that his initial refusal to deal was "irrevocable, immutable, permanent and final." The word "final" does not appear in the *Garelick* case. *Garelick* and the other cases cited by petitioner, hold, simply, that an illegal refusal to deal creates a cause of action when it occurs and is not restarted by repeated requests which the defendant refuses. II. P. Areeda & D. Turner, *Antitrust Law*, ¶325b at 121 (1978).

Adoption of a rule of finality in refusal to deal cases that would require the refusal to be "irrevocable, immutable, permanent and final" to commence the running of the limitations period would effectively gut the statute of limitations as a statute of repose and disserve the remedial purposes of the antitrust laws. It would dissuade a buyer, otherwise inclined to deal with a seller after an unequivocal initial refusal (as in this case), from ever doing so for fear that a suit filed six years later based on the initial refusal was not barred because the refusal was not "final" enough.

3. Petitioner's "Continuing Violation" Of The Sherman Act Does Not Continue The Accrual Of A Cause Of Action Absent An Overt Act During The Limitation Period Which Injures Respondents.

Respondents' reliance on "a variety of predatory practices" (Br. 8) evidencing UDA's continuing "monopolization of the market at issue" (Br. 8) as the basis for extending the limitations period ignores the basic principle that the gist of the §4 Clayton Act action is injury to a plaintiff's business or property not the mere violation of the statute. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, —— U.S. ——, 106 S.Ct. 1348 (1986);[3] *Keogh v. Chicago N.W. Ry. Co.*, 260 U.S. 156, 165 (1922). There is no genuine issue of fact as to the source of respondents' damage or when it occurred.[4] Respondents have described it with unmistakable clarity:

> Until approximately 1974, plaintiffs were able to sell all of their milk in the Arizona market for the so-called "blend price" . . . . The gravamen of this lawsuit is that defendants, by their monopolistic practices and . . . concerted activities . . . have forced plaintiffs to divert their milk from the . . . market . . . or sell it in other markets for a . . . lower . . . price.

Pet. A56; see also *id.* at 61.

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[3] "[R]espondents must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from illegal conduct." 106 S.Ct. at 1356.

[4] Respondents' contention that the source of respondents' damage is not ripe for review (Br. 8, n.8) ignores the fact that petitioner's summary judgment motion was filed following the close of all discovery and the submission of respondents' proposed final pre-trial order which set out in elaborate detail respondents' "Lost Income Analysis". Pet. A63.

The only actionable injury that respondents could suffer as a result of petitioner's "monopolization of the market" was that caused by the refusal of petitioner and the milk dealers to buy respondents' milk. That refusal occurred "[d]uring 1974 and 1975." Br. 2. The "mere subsequent refusals do not create new causes of action which would extend the limitations period." Br. 7.

The "overt acts" in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 418, 502 n.15 (1968) which constituted the "continuing violation" are absent here. Neither *Hanover* nor *Twin City Sportservice, Inc. v. Charles O. Finley*, 512 F.2d 1264 (9th Cir. 1975) (Br. 9, n.10), relied on by the court of appeals (Pet. A11), holds that the mere existence of an unlawful contract is sufficient to continue the running of the limitations period. Finley's 1968 antitrust counterclaim was not barred because his cause of action arose from Sportservice's "overt act" in suing to enjoin Finley's breach in 1967 of an illegal 1954 contract. *Airweld, Inc. v. Airco*, 742, 1184, 1190 (9th Cir. 1984); *Aurora Enterprises v. National Broadcasting Co.*, 688 F.2d 689, 694 (9th Cir. 1982).

Here, there is neither allegation by respondents, suggestion in the discovery record nor reliance by the court of appeals on a contention that petitioner sought to enforce the alleged full supply contracts during the limitations period. Indeed, the district court's finding, based on a full discovery record and "[t]he parties statement of facts pursuant to Local Rule 11(i)"[5] (Pet. A20), that "there are no clear cut allegations

[5] Local Rule 11(i), United States District Court, District of Arizona provides: "(1) Any party filing a motion for summary judgment shall set forth separately from the memorandum of law, and in full, the specific facts on which he relies in support of his motion. The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to a

or evidence of overt acts by Defendant UDA during the limitations period" (Pet. A24) was not disturbed by the court of appeals. The court of appeals "continuing harm doctrine" (Pet. A12) simply dispenses with the need for an overt act during the limitations period required by this Court and other circuits to avoid the bar of the statute. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); see Pet. 17-20.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to review the judgment of the court of appeals should be granted.

June 2, 1987

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specific portion of the record where the fact may be found (i.e., affidavit, deposition, etc.) Any party opposing a motion for summary judgment must comply with the foregoing in setting forth the specific facts, which the opposing party asserts, including those facts which establish a genuine issue of material fact precluding summary judgment in favor of the moving party. . . ."